

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Federal-State Joint Board on
Universal Service

American Telecommunication Systems, Inc.

Equivoice, Inc.

Eureka Broadband Corporation

TON Services, Inc.

Value-Added Communications, Inc.

CC Docket No. 96-45

**PETITION FOR RECONSIDERATION
OF ORDER COMPELLING OVERPAYMENT OF USF FUNDING OBLIGATION**

Pursuant to Section 405 of the Communications Act,¹ and by its undersigned counsel, Eureka Broadband Corporation (“Eureka” or the “Company”) hereby respectfully requests that the Commission grant this petition for reconsideration of its *USF Payment Order*² released March 14, 2007 in the above-captioned proceeding. Specifically, Eureka requests that the *USF Payment Order* be reversed.

¹ 47 U.S.C. § 405.

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, DA 07-1306 (rel. March 14, 2007) (*USF Payment Order*).

I. BACKGROUND: THE USF PAYMENT ORDER ONLY ADDRESSES ONE OF MULTIPLE RULINGS BY USAC THAT ARE UNDER APPEAL, AND THAT AFFECT EUREKA’S USF PAYMENT OBLIGATION

The *USF Payment Order* resolves a single issue raised by Eureka and four other petitioners: Whether petitioners can receive a credit on their USF payment obligations if they can demonstrate that they were being treated as an end user for USF purposes, and that the petitioners’ underlying carrier was making the required USF payments in their stead. The *Order* characterizes this issue as “USAC’s Decision on Contributor Appeal.”³ The *Order* rejects the petitioners’ arguments, based on several findings:

- Any double payment that results from payment by the petitioner’s wholesale carrier is not the fault of USAC. “As such, Petitioners’ relief, to the extent appropriate, lies with the underlying carriers, not a refund or credit from the USF.”⁴
- At all relevant times, Form 499 and other USAC materials “provided direction” regarding the definition of carriers obligated to pay USF and how to report reseller revenue.⁵
- Parties cannot “contract away” the obligation to pay USF.⁶
- USAC “generally does not have the ability to determine with any certainty whether and on what revenue a ‘double payment’ was received.”⁷

The Bureau concludes by acknowledging that, to the extent that the petitioners’ wholesale carriers paid the petitioners’ USF obligation, “the underlying carriers may have erred,” and reiterates that “the proper avenue for recourse is with those underlying carriers.”⁸

³ *USF Payment Order*, DA 07-1306 at ¶ 6.

⁴ *Id.* at ¶ 9.

⁵ *Id.* at ¶ 11.

⁶ *Id.* at ¶ 12.

⁷ *Id.* at ¶ 13.

⁸ *Id.* at ¶ 14.

In discussing the petitioners' petitions for review, the Bureau *Order* focuses exclusively on the Decision on Contributor Appeal. It ignores the fact that numerous other aspects of USAC's rules regarding the computation of USF payments remain under appeal. Specifically, pending before the Commission since 2005 are petitions for reconsideration of the Wireline Competition Bureau's *Form 499-A Order*.⁹ Multiple USAC rules adopted in that order have been appealed by SBC Communications, Qwest Communications International, and Business Discount Plan, Inc., and Sprint Corporation, as well as by Eureka and other petitioners.

The USAC rules that are being challenged in the appeal of the *Form 499-A Order* go well beyond the Decision on Contributor Appeal, and include the following:

- USAC's one-year statute of limitations that is imposed on Form 499-A revisions that reduce a carrier's USF payment obligation;
- the "one-way ratchet" policy that limits a carrier's ability to amend its filings to achieve reductions in its USF obligation, but that provide no limits on upward revisions to that obligation; and
- the imposition of a "good cause" test for acceptance of revised Form 499-As for years preceding 2005.

As discussed below, these issues, which remain unresolved pending appeal, when combined with the *USF Payment Order*, impose grossly unfair burdens on petitioners that are not permitted under the Communications Act.

⁹ *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.*, Order, CC Docket Nos. 96-45, 98-171, 97-21, DA 04-3669 (rel.. Dec. 9, 2004) ("*Form 499-A Order*").

II. IN REFUSING TO CONSIDER USF AMOUNTS PAID BY EUREKA'S UNDERLYING CARRIER, THE BUREAU'S DECISION IGNORES EVIDENCE IN THE RECORD

The *USF Payment Order* emphasizes form over substance. In refusing to consider USF payments made on behalf of Eureka and other petitioners by their underlying carriers, the Bureau bases this decision on its conclusion that the 499 forms were in order, that the instructions were clear, and USAC's bills were accurate.¹⁰ After four paragraphs of this discussion, the Bureau spends one paragraph addressing petitioners' arguments that forcing payment by petitioners, after their underlying carriers have already paid the USF on their behalf, would result in a double payment of the required amounts.

The Bureau does not dispute that double payments would result from USAC's policy. The Bureau does not even mention the evidence in the record of the proceeding that shows that the underlying carriers paid USF contributions on behalf of petitioners. Rather, the Bureau rejects petitioners' arguments solely on the generic statement that it would be too difficult for USAC to determine "with certainty" that all due USF funds were paid – the Bureau posits that, to determine "with certainty" that all due USF payments have in fact been paid, USAC would have to engage in an extraordinarily complex exercise in cross-auditing all 499s filed by the underlying carriers and petitioners.¹¹

This attempt at rationalizing the USAC decision is disingenuous. The amount of USF funding that will now be collected as a result of the *USF Payment Order*, in Eureka's case, is \$296,200.10. USAC has billed Eureka this amount **based solely on the data that Eureka provided to USAC**, and which Eureka supported with extensive documentation that was

¹⁰ *USF Payment Order*, DA 07-1306 at ¶¶ 9-12.

¹¹ *See id.* at ¶ 13.

submitted to USAC and which was included in the record of this proceeding.¹² This data demonstrated that precisely this amount – \$296,200.10 – was paid into USF by MCI and passed through in MCI bills to Eureka. USAC relies exclusively on this Eureka-provided data to determine “with certainty” the amount that is payable by Eureka. At the same time, USAC – and now the Bureau – find that the **same data** are inadequate to determine that MCI has made this payment to USF.

The Bureau and USAC cannot be heard to argue that the Eureka-supplied data that are adequate to identify USF contributions for Eureka are not adequate to identify amounts paid by MCI. Accepting the veracity of Eureka’s data for one purpose while at the same time rejecting it for another is arbitrary and capricious and compels reversal.

Besides this clear contradiction, this aspect of the Bureau’s *Order* demonstrates that it has simply ignored evidence on the record that proves Eureka’s USF obligation was paid by MCI. The Bureau *Order* does not even attempt to address the arguments made in Eureka’s appeal or the extensive showings in the record of this proceeding that support it. A refusal by the Bureau to even acknowledge, much less address, relevant evidence in the underlying record is clearly reversible error. As the D.C. Circuit Court of Appeals found in a similar case:

We infer that, if it were possible to reconcile the evidence with the agency’s decision, the FCC would at least have attempted to do so. The FCC’s “failure to respond to contrary arguments based on solid data” not only, as we said, “epitomizes arbitrary and capricious decisionmaking,” . . . it also leaves the court with no basis for allowing the . . . rate to remain in place pending further consideration on remand.¹³

¹² Appeal of Decisions of the Universal Service Administrative Company Concerning Eureka Broadband Corporation’s Revision to FCC Form 499-A and Application of Charges, submitted in CC Docket No. 96-45 on Sept. 30, 2004, at 15-16; 15 n.22; and Exhibit 1 (*Eureka USAC Appeal*). This Appeal is also appended to Eureka’s Petition for Review of the Universal Service Administrative Company on Remand Concerning Eureka Broadband Corporation’s Filing of Revisions to FCC Forms 499-A, submitted in CC Docket No. 96-45 on June 23, 2006, at Exhibit C (*Eureka Petition for Review*).

¹³ *Illinois Public Telecom. Ass’n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997) (citations

Finally, the Bureau attempts to justify its imposition of duplicative USF payments on Eureka by arguing that Eureka's obligation to pay USF "cannot be contracted away."¹⁴ The Bureau fails to indicate how this observation is relevant to the case at bar, and it is not relevant. Indeed, the Bureau freely acknowledges that it can – and does – accept payment of USF funding obligations from third parties: "A third-party may agree to pay on behalf of a reseller, and the Administrator may accept payments from the third-party, but if the third-party does not pay on the reseller's behalf, the reseller must pay."¹⁵ In so stating, the Bureau acknowledges the argument that Eureka has made – that a third party has indeed paid Eureka's USF obligation. The Bureau has made no finding that "the third party [did] not pay on reseller's behalf" and no such finding is possible – indeed, Eureka has supplied ample record evidence that MCI did pay the USF payments associated with Eureka's service. The Bureau *Order* therefore concedes Eureka's point – that USAC has already received payment for the amounts owed by Eureka – and at the same time completely ignores Eureka's record evidence in support of this fact. Because the *USF Payment Order* acknowledges that petitioners can meet their USF payment obligation through contributions made by third parties, yet refuses to acknowledge – much less consider – record evidence showing that such third party payments have been made, the Bureau has failed its most basic duty as a regulator, and its order must be reversed.¹⁶

omitted), citing *Illinois Public Telecom. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).

¹⁴ *USF Payment Order*, DA 07-1306 at ¶ 12.

¹⁵ *Id.* at ¶ 12.

¹⁶ *E.g., Alexander J. Serafyn v. F.C.C.*, 149 F.3d 1213, 1220 (1998) ("We simply note on remand the Commission must consider all the evidence together before deciding . . .).

III. USAC’S RULES PROHIBITING RETROACTIVE ADJUSTMENTS OF FORM 499, AND ELIMINATING PAST REFUNDS – WHICH RULES REMAIN UNDER APPEAL – EFFECT A DOUBLE-RECOVERY OF USF PAYMENTS, AND PREVENT EUREKA FROM SEEKING RECOVERY OF OVERPAID AMOUNTS

The Bureau *Order* acknowledges the obvious: that, to the extent that underlying carriers have paid USF, and petitioners are now forced to pay USF, there will be a double payment into the USF subsidy pools. The Bureau asserts that “USAC has rightly left such matters for the entities involved in the transaction to determine.”¹⁷ The Bureau offers the ameliorative advice that, “[t]o the extent that Petitioners’ underlying carriers charged them as end-user customers, the underlying carriers may have erred. As such, the proper avenue for recourse for Petitioners is with those underlying carriers.”¹⁸

Of course, such recourse is rendered impossible by USAC’s own policies, which eliminate the ability of the underlying carriers to submit amended 499s in order to receive refunds of USF overpayments. The Commission therefore invites Eureka to seek recovery of \$296,200.10 that MCI paid to USAC on Eureka’s behalf, but USAC’s policies, which remain under appeal, prevent MCI from obtaining a refund of these overpaid amounts from USAC. The Bureau’s suggestion that recourse is available to petitioners from outside the Commission is crudely cynical. In fact, the Bureau and USAC have created a “Catch 22” that ensures double payment into USF, and eliminates any chance of recovery to petitioners. Because the *USF Payment Order* can have no other effect than causing a double recovery of USF payments, while denying any form of relief to petitioners, it is inherently unreasonable and must be reversed. Eureka expressly raised this “Catch 22” in its Appeal of the USAC decision.¹⁹ The Bureau does

¹⁷ *USF Payment Order*, DA 07-1306 at ¶ 13.

¹⁸ *Id.* at ¶ 14.

¹⁹ *Eureka Appeal*, *op cit.* n.12, at 15-16.

not even acknowledge Eureka's argument when stating its conclusion that recourse against underlying carriers is available. Because the Bureau simply ignored the record of the underlying proceeding in reaching its conclusion, and because lack of recourse would make it impossible for Eureka to recover its over-payment into the fund, the Bureau *Order* is arbitrary and capricious, and unjust and unreasonable, and must be reversed.

IV. NEITHER USAC NOR THE COMMISSION CAN COMPEL USF PAYMENTS IN EXCESS OF THE AMOUNTS PRESCRIBED BY THE COMMUNICATIONS ACT

The obligation of petitioners to pay into the USF subsidy pools is defined by § 254 of the Communications Act, and the contribution factor computed and published quarterly by the Commission.²⁰ Neither USAC nor the Commission has the authority to compel payment in excess of this statutorily-determined amount.²¹ The federal courts have applied the maxim of statutory interpretation *expressio unius est exclusio alterius* – the “mention of one thing [in a statute] implies exclusion of another” – to prohibit the imposition of charges higher than those expressly required by statute.²² As noted in Section III above, the collection of USF payments from Eureka, after it has already been demonstrated that MCI has paid the USF obligation on Eureka's behalf, constitutes a double payment into the fund. The *USF Payment Order* requires Eureka to make a payment into USF that is demonstrably in excess of the payment required by statute. In this respect, the *Order* is *ultra vires*, and must be reversed.

²⁰ 47 C.F.R. § 54.709.

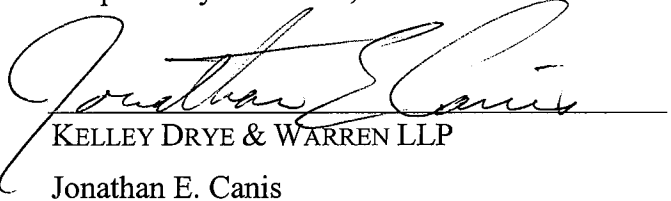
²¹ *Northern States Power Co. v. U.S.*, 73 F.3d 764,766 (1996) (Evaluation of IRS interest computation methods cannot consider extraneous factors if the enabling statute is clear: “Our analysis starts, and in this case ends, with the statutes themselves.”)

²² *E.g., Beverly Enterprises, Inc. v. Herman*, 119 F. Supp. 2d 1, 13 (2000), *citing, e.g., Martini v. Federal Nat'l Mortgage Ass'n*, 138 F.3d. 1336 (D.C.Cir. 1999).

V. CONCLUSION

For the reasons discussed herein, the *USF Payment Order* is arbitrary and capricious, inevitably yields unjust and unreasonable outcomes, and is *ultra vires*. As such, the full Commission must reverse the Bureau *Order* on reconsideration.

Respectfully submitted,



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Dated: April 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on April 23, 2007, the foregoing "PETITION FOR RECONSIDERATION OF ORDER COMPELLING OVERPAYMENT OF USF FUNDING OBLIGATION" was mailed, via first-class mail, postage prepaid to the following:

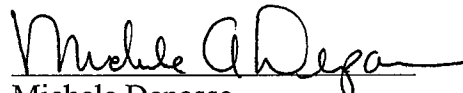
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